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Search and Seizure in 2004: Dialogue or Dead-End?

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Search and Seizure in 2004 — Dialogue or Dead-End?

Alan Young*

I. INTRODUCTION

Four recent cases leave a haunting impression that section 8 of the *Charter of Rights and Freedoms* (“Charter”) has had little impact upon policing in Canada. In October 2004, in *R. v. Calderon*,¹ the Ontario Court of Appeal excluded drugs seized upon a warrantless search of a vehicle and trunk. The grounds for the search were based upon a “smuggler’s profile” which was satisfied upon the discovery of fast food wrappers, a cell phone, a map and a duffel bag found in plain view in the car. In addition, the police believed that the car was too expensive for this driver and this served to confirm their suspicion that the driver was a drug courier. Not only did the profile of “neutral indicators” utilized by the police fall short of reasonable and probable grounds, but these officers had already employed this profile on dozens of occasions with no success in uncovering contraband. Perhaps it may be said that the Court of Appeal saved the day by excluding this evidence, but one has to wonder how it is still possible for police officers to mistakenly assume that a weakly-grounded intuition or hunch can constitute reasonable and probable grounds.

Admittedly, constitutional norms are stated at a high level of generality and there will always be some doubt and ambiguity with respect to the scope of protection of any particular Charter right. However, ambiguity at the periphery does not mean that there does not exist a core meaning for the right with definable content. The *Calderon* case suggests that the core meaning of section 8 has been lost on law enforcement officials, and three other recent cases fuel this fear. On January 24, 2005, the Saskatchewan Court of Appeal excluded \$55,000 seized from

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¹ [2004] O.J. No. 3474, 188 C.C.C. (3d) 481 (C.A.).

the accused when the police had no grounds to support their belief that this money represents proceeds of crime.² On January 25, 2005, the Ontario Court of Appeal excluded cocaine seized from the accused after the police frisked the accused in the area of the groin during an investigative detention.³ Finally, on January 28, 2005, a settlement was reached in a case in British Columbia in which a driver was randomly stopped for the purposes of a drug search by a state trooper from Texas who was working in Canada to educate the RCMP about the operation of the Texas Troopers' profiling program.⁴

The violations in these four cases are so obvious and self-evident that they lead to the conclusion that there has been an ineffective incorporation of constitutional norms within Canadian police culture. It is a mistake to assume that constitutional rulings are self-executing, and it is very surprising that nearly 25 years after the enactment of the Charter little empirical work has been done in Canada to measure the impact of constitutional rights and the rate and success of implementation of various constitutional entitlements. American scholars have realized the importance of studying the "law in action", and not just the "law on the books" and have produced empirical studies examining the impact of the *Miranda* right to counsel warnings and the impact of the fourth amendment protections against unreasonable search and seizure.⁵

Without any extensive studies having been conducted in Canada with respect to the implementation of Supreme Court Charter decisions, we can only speculate whether or not the police are trying to live up to the constitutional obligations imposed upon them by the Court. Although some studies have been conducted, most of the studies have tended to be largely anecdotal or impressionistic. Despite the methodological shortcomings of these studies, some believe there are preliminary indica-

² *R. v. Perello*, [2005] S.J. No. 60, 2005 SKCA 8 (C.A.).

³ *R. v. Byfield*, [2005] O.J. No. 1609.

⁴ R. Mickleburgh, "R.C.M.P. Reach Settlement with Off-duty Policeman" *The Globe and Mail* (29 January 2005) A6.

⁵ See e.g., Heffernan and Lovely, "Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law" (1991) 24 Mich. L. Rev. 311; P. Cassell and B. Haymen "Police Interrogation in the 1990's: An Empirical Study of the Effects of *Miranda*" (1996) 43 U.C.L.A. L. Rev. 839; P. Cassell, "Miranda's Social Costs and Empirical Reassessment" (1996) 90 Nw. U.L. Rev. 387; D. Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 U. Chicago L. Rev. 665.

tions that the police are prepared to modify their practices to accommodate the Supreme Court's vision of the Charter:

The police have managed to cope with new requirements imposed by the *Charter* and have effectively implemented changes to standard procedures. Although these changes may not constitute "tidal waves and earthquakes" the *Charter* has clearly had an indelible impact on police forces and on the formal and informal relationships between police and government organizations. Supreme Court *Charter* decisions have required police to look for support outside the police force and have pressured government organizations to reassess their responsibilities to the police. Police forces have generally been able to adapt to most "adverse" decisions by altering investigative methods and procedures, and where necessary, by abandoning some practices which previously had not been improper. The Metropolitan Toronto Police continually and strenuously strive to ensure that all officers are made aware of their *Charter* obligations.⁶

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This optimistic assessment of institutional compliance is undercut by the fact that trial and appellate court intervention is still necessary to correct clear-cut and obvious violations of rights. The need for empirical studies is also underscored by the fact that pre-Charter scholarship suggests systemic police disregard for cumbersome legal requirements relating to search warrants. The Law Reform Commission of Canada reported in 1981 that 58.9 per cent of search warrants were invalidly issued (as based on a national average with some jurisdictions showing consistent compliance and others dismally failing).⁸ Initial indications in

⁶ K. Moore, "Police Implementation of Supreme Court of Canada *Charter* Decisions: An Empirical Study" (1992) 30 Osgoode Hall L.J. 547, at 577.

⁷ R. Evonshire, "The Effects of Supreme Court *Charter*-Based Decisions on Policing: More Beneficial than Detrimental" (1994), 31 C.R. (4th) 82, at 85-86.

⁸ Law Reform Commission of Canada, *Police Powers — Search and Seizure in Criminal Law Enforcement*, Working Paper No. 30 (1983), at 86.

the post-Charter era are not encouraging. In an informal survey conducted in 1995 by Mr. Justice Casey Hill of the Ontario Court (General Division), it was found that 39 per cent of search warrants were invalidly issued.⁹ More recently, a more systematic review concluded that “the current study, like those which preceded it, identified a disturbingly pronounced gulf between law and practice. In effect, 69% of the court orders in this study ought not to have been issued.”¹⁰ Although there is unlikely a causal connection, it is ironic (or perhaps tragic) that non-compliance with legal requirements pertaining to search warrants has apparently increased since the passage of the Charter.

In light of the evidence of systematic disregard of legal requirements for a search warrant and the evidence of a low rate of exclusion for section 8 violations, it is not a giant leap to tentatively conclude that privacy is meekly protected in Canada. On the surface, the Supreme Court has left the impression that it has taken an expansive and progressive approach to the protection of privacy. Since 2000, the Court has declared that there is a reasonable expectation of privacy in the contents of a bus locker¹¹ and the contents of a stolen safe found by the police.¹² It has also provided greater protection against strip searches¹³ and issued restrictive guidelines for searches of a lawyer’s office.¹⁴ More importantly, unlike many of the hollow section 8 triumphs of the 1990s,¹⁵ in these later cases the Court has actually excluded non-conscriptive evidence seized as a result of an unreasonable search. Despite this recent track record, the section 8 rulings from the Supreme Court of Canada in 2004 support my assertion that privacy is meekly protected.

⁹ Mr. Justice C. Hill, “The Role of Fault in Section 24(2) of the Charter”, in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Agincourt, Ontario: Carswell 1996).

¹⁰ Mr. Justice C. Hill, Scott Hutchison, Leslie Pringle, “Search Warrants: Protection or Illusion?” (1999), 28 C.R. (5th) 89, at 101.

¹¹ *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631.

¹² *R. v. Law*, [2002] S.C.J. No. 10, [2002] 1 S.C.R. 227.

¹³ *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679.

¹⁴ *R. v. Fink*, [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209; *Maranda v. Richer*, [2003] S.C.J. No. 69, [2003] 3 S.C.R. 193.

¹⁵ On many occasions, the Court would condemn a particular police practice and then admit the seized evidence on the basis of good faith — see, e.g., *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 [hereinafter “*Duarte*”]; *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36; *R. v. Silveira*, [1995] S.C.J. No. 38, 97 C.C.C. (3d) 430; *R. v. Evans*, [1996] S.C.J. No. 1, 104 C.C.C. (3d) 23.

In *R. v. Tessling*,¹⁶ the Court held that surveillance of a private home by a Forward Looking Infra-Red device (FLIR) did not constitute a search as it did not violate a reasonable expectation of privacy. In *R. v. Mann*,¹⁷ the Court upheld the power of search upon investigative detention but excluded the seized evidence ruling that the search exceeded the bounds of the limited, protective search incident to detention. There is a common theme linking these two disparate cases. Both cases fail with respect to the fundamental objective of providing effective control of police discretion. *Tessling* lets the police make the decision whether new technology can invade the privacy of the home, and *Mann* provides power with little indication of how to exercise this power. As La Forest J. noted in 1986, the police “need the clearest possible rules” for the courts to be able to “exercise any effective control over the exercise of police discretion”¹⁸ If the police are not provided with clear guidelines for the practical implementation of a constitutional right there is a strong likelihood the right will be disregarded or circumvented.

Reasonable people may disagree with the results of a particular decision but a neutral evaluation of the merits of the decision can be made on the basis of determining whether the Court has issued a decision which is clear, comprehensive and internally coherent. Without these qualities, the decision will never be able to do anything beyond resolving the very dispute presented in the individual case. The objective of constitutional adjudication should be to reduce future litigation and not increase legal conflict by issuing decisions that raise more questions than they answer. It has proven difficult for the judiciary to wholly abandon its traditional role of adjudicating a specific dispute and begin focusing on the broader legislative or policy implications of the dispute. Not only must the decision guide and direct law enforcement officials but it must also provide the legislative branch of government with a clear direction as to its respective role in developing effective public policy for the administration of criminal justice.

In our constitutional regime, judicial activism does not simply mean that the judiciary has hijacked the development of public policy. It has the more subtle meaning of the judiciary prompting and shaping the future direction of criminal justice policy. The Supreme Court has spoken of

¹⁶ [2003] O.J. No. 186, 171 C.C.C. (3d) 361 (C.A.).

¹⁷ [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59.

¹⁸ *R. v. Landry*, [1986] S.C.J. No. 10, [1986] 1 S.C.R. 145, at 181.

this constitutional dynamic as a “dialogue”.¹⁹ To ensure the dialogue is meaningful and well-informed, it is important that the judiciary recognizes that it lacks the competence and authority to create an elaborate set of rules and that its activist role should be restricted to the initiation of a “dialogue” which can compel government to take corrective, legislative steps. The emerging notion of a constitutional dialogue has had its most vibrant application in the area of criminal justice. As Professor Stribopoulos has noted:

This dialogue has frequently played itself out in the criminal procedure context. While in the past, Parliament has been reluctant to amend the *Criminal Code* to implement recommendations made by the Law Reform Commission of Canada, it has been quick to respond with legislative reform whenever its hand has been forced by the *Charter* decisions of the Supreme Court. In circumstances where the Court has held that a particular investigative power of practice was unconstitutional, either because it lacked the necessary legal authority, or because its enabling legislation did not meet minimum *Charter* requirements, a legislative response has usually been forthcoming from Parliament. The legislation has typically refined the investigative power involved “to build in civil libertarian safeguards that meet the requirements of the *Charter* as set out by the Supreme Court of Canada.” This dynamic has been embraced by the Court, which has maintained that the reciprocal institutional review that it entails has “the effect of enhancing the democratic process, not denying it.”²⁰

The troubling feature of both the *Tessling* and *Mann* cases is that they do not contain the seeds of dialogue. Ruling that FLIR does not constitute a search provides no incentive for Parliament to review and assess the need for regulating this technology and related technological developments. By affirming the existence of the powers of investigative detention and search incident to detention the Court has left the mistaken impression that the judiciary has fully resolved the contours of this

¹⁹ *R. v. Mills*, [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321, at 339; *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493; see also, K. Roach, “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures” (2001) Can. Bar Rev. 48; P. Hogg and A. Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 75.

²⁰ J. Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41(2) Alta. L. Rev. 335, at 387.

new power with no need for legislative intervention. These cases do not trigger dialogue — they are dead-end decisions leading nowhere for the development of criminal justice policy. They trigger silence by creating the mistaken impression that the problem has been solved and the issue resolved.

II. TESSLING, TECHNOLOGY AND THE SANCTITY OF THE HOME

Upon receiving tips from two informants, the police commenced an investigation into a suspected hydroponic marijuana grow operation involving Tessling. Hydro records did not confirm the presence of increased consumption, so the police chartered a plane to fly over the Tessling property. The plane was equipped with a Forward Looking Infra-Red camera (FLIR) in order to conduct a “structure profile” of the property. FLIR will produce a picture or image of the thermal heat radiating from the building. The police believed that the images of the heat patterns were consistent with a marijuana growing operation. Armed with the tips and inferences drawn from the FLIR images, the police obtained a warrant and upon entry they found weapons and a large quantity of marijuana.

The Ontario Court of Appeal ruled that the FLIR imaging violated a reasonable expectation of privacy thus requiring the police to obtain a warrant prior to entry.²¹ Although the court recognized that the imaging could not reveal any precise details of activity within the home and was a minimal intrusion upon “informational privacy”, the Court was resolute in its conclusion that the targeting of a home to construct a profile of heat emanations was an intrusion into privacy. Madame Justice Abella stated:

It is, it seems to me, overly simplistic to characterize the constitutional issue in this case as whether there is a reasonable expectation of privacy in heat emanating from a home. The surface emanations are, on their own, meaningless. But to treat them as having no relationship to what is taking place inside the home, is to ignore the stated purpose of their being photographed, that is, to attempt to determine what is happening inside the home. It would, I think, directly contradict the reasonable privacy expectations of most members of the public to

²¹ *R. v. Tessling*, [2003] O.J. No. 186, 171 C.C.C. (3d) 361 (C.A.).

permit the state, without prior judicial authorization, to use infrared aerial cameras to measure heat coming from activities inside private homes as a way of trying to figure out what is going on inside.²²

The Court of Appeal asserted that the intrusion was significant and “almost Orwellian in its theoretical capacity”; however, the Supreme Court of Canada unanimously concluded that the intrusion was so insignificant that it did not even engage the Constitution.²³ The Court concluded:

For reasons already stated, I do not regard the use of current FLIR technology as the functional equivalent of placing the police inside the home. Nor is it helpful in the Canadian context to compare the state of technology in 2004 with that which existed at Confederation in 1867, or in 1982 when s. 8 of the *Charter* was adopted. Having regard to its *purpose*, I do not accept that s. 8 is triggered by a FLIR image that discloses that heat sources of some unknown description are present inside the structure, or that the heat distribution is uneven. Certainly FLIR imaging generates information *about* the home but s. 8 protects people, not places. The information generated by FLIR imaging about the respondent does not touch on “a biographical core of personal information,” nor does it “ten[d] to reveal intimate details of [his] lifestyle” (*Plant*, at p. 293). It shows that some of the activities in the house generate heat. That is not enough to get the respondent over the constitutional threshold.²⁴

Not only is it troubling that the Court of Appeal and the Supreme Court employed highly divergent approaches to the concept of privacy, it is ironic that the Appellate Court took a more expansive approach in light of the fact that in the 1980s and 1990s the Appellate Courts were consistently overturned by the Supreme Court for adopting a rather parsimonious perspective on privacy. The *Tessling* decision is also puzzling because it seems so clearly inconsistent with the approach taken by the Supreme Court in earlier cases. There is little doubt that privacy is an elusive and malleable concept and reasonable disagreements over the scope of the right are inevitable. As the Supreme Court has stated: “expectation of privacy is a normative concept rather than a description

²² *Id.*, at 377-80.

²³ *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129.

²⁴ *Id.*, at 150.

concept”,²⁵ and in setting normative standards, courts will have to struggle with the reality that privacy is a culturally-relative concept with few universal truths to assist in the development of the contours of the right.

Privacy may be a protean concept, but there is a judicial consensus relating to two aspects of this right. First, from a western perspective, privacy is seen as a fundamental component of personhood and integrally connected to self-fulfillment in a modern society. It has been said that privacy is as vital to modern living as “oxygen is for combustion”.²⁶ Second, it is recognized that technological developments pose the greatest threat to privacy and it has been noted that “electronic surveillance is the greatest leveler of human privacy ever known”.²⁷ As one commentator has recently mused:

Technological devices in the hands of the government, however, are not an unmitigated blessing. Once again, the sword of technology has two razor-sharp edges. While one edge can be employed to preserve a nation’s security, the other can imperil its very essence. Constitutional freedoms that define our country and make it a bastion of liberty can be severely diminished, even destroyed, by uses and abuses of the tools of progress. The reality, or even the threat of, unregulated electronic monitoring can chill First Amendment freedoms of speech, press and association... Of greatest significance for present purposes, sophisticated eavesdropping equipment, electronic tracking devices, aerial surveillance, and other tools that dramatically improve upon human perceptual abilities and enable the government to hear, see, and otherwise learn matters the people seek and wish to keep confidential can eviscerate the precious assurance of privacy safeguarded by the Fourth Amendment right against “unreasonable searches.” What once were barriers to human senses are easily hurdled, and matters that were once inaccessible to those senses are brought within their reach by the products of innovation.²⁸

²⁵ *Id.*, at 145; for an interesting discussion of the moral and cultural relativity of privacy, see Barrington Moore Jr., *Privacy: Studies in Social and Cultural History* (N.Y.: M.E. Sharpe, 1984).

²⁶ C. Fried, “Privacy” (1967-8) 77 Yale L.J. 475, 478.

²⁷ *U.S. v. White*, 401 U.S. 745, 756 (1971) [hereinafter “*White*”].

²⁸ J. Tomkovicz, “Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures” (2002) 72(1) Miss. L.J. 317, at 320-21.

Admittedly, FLIR does not engage as significant an intrusion as the electronic monitoring and recordings of conversations, but the question remains whether or not a free society will tolerate and accept the random and unregulated use of any technology designed to assist police in locating and apprehending suspected criminals.

Historically, rules and regulations pertaining to investigative searches were designed to protect property rights. The emergence of intrusive technology in the past century compelled a transformation of the approach to constitutional restrictions on search powers. In light of the increasing reliance upon wiretap, the United States Supreme Court in 1967 ruled that the prohibition on unreasonable searches was designed to protect a reasonable expectation of privacy even when there is no intrusion upon property rights.²⁹ In 1982 the Supreme Court of Canada followed suit and held that section 8 of the *Charter* was designed to protect this reasonable expectation of privacy.³⁰ There is no question that the reformulation of the right is responsive and necessary in light of the changing nature of law enforcement; however, moving from a concrete measure (*i.e.*, intrusion onto property) to an abstract standard (privacy) would pose greater difficulties for the courts. Property rights are well-defined whereas privacy often lies in the eye of the beholder.

The American and Canadian Supreme Courts took very divergent approaches to this abstract issue. The American courts adopted an “assumption of risk” approach in which a reasonable expectation of privacy would be limited by the extent to which private information was already vulnerable to detection by technological devices or by ordinary surveillance. The American approach is based upon “the fallacious notion that privacy is an all or nothing proposition and that a person has no legitimate expectation of privacy *vis-a-vis* the government concerning information partly exposed in a very limited way to a very limited group.”³¹ For example, with respect to the installation of a tracking device to monitor the movements of a suspect in his car the U.S. Supreme Court stated:

²⁹ *U.S. v. Katz*, 389 U.S. 347 (1967).

³⁰ *Hunter v. Southam*, [1984] 2 S.C.R. 145.

³¹ W. LaFare, “Nine Key Decisions Expand Authority to Search and Seize” (1983) 60 A.B.A.J. 1740.

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.³²

With respect to aerial surveillance of the backyard of a home, the Court stated:

In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.³³

Ultimately, the approach of the American courts was so restrictive that one commentator concluded that:

Anyone can protect himself against surveillance by retiring to the cellar, cloaking all windows with thick caulking, turning off all the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function. What kind of society is that? Is it one in which a homeowner is put to the choice of shuttering up his windows or of having a policeman look in?³⁴

In the early Charter-era, the appellate courts followed the restrictive American approach by reducing the expectation of privacy on *ad hominen* considerations and on the basis of the assumed risks of detection. For example, the Ontario Court of Appeal was able to reach the counter-intuitive

³² *U.S. v. Knotts*, 103 S.Ct. 1081, at 1085 (1983).

³³ *Ciraolo v. California*, 106 S.Ct. 1089, at 1813 (1986).

³⁴ A. Amsterdam, "Perspectives on the Fourth Amendment" (1974) 58 Minn. L.R. 359, at 402.

conclusion that there is no reasonable expectation of privacy in a bathroom stall at a public washroom because:

In our opinion, the appellants had no reasonable expectation of privacy. The police surveillance established that this public washroom had become the meeting place for this group of men, to which both of the appellants appear to have adhered, for the practice of homosexual acts. The conduct probably offended s. 157 of the *Criminal Code*. That others would observe and recognize what was going on from the persistent use that these men made of the place was a risk that they undoubtedly understood. In the circumstances, by reason of their lookouts and precautions, perhaps they had an expectation that they would escape detention by the police or interference by the public. But that is not an expectation of privacy. This is not a case of persons resorting to the privacy of a closed cubicle in a public washroom for its expected use or for some personal indulgence that would be considered objectionable if carried on in public. On the contrary, the evidence, in the case of the appellant Mr. Lofthouse, allows no conclusion other than that the group intended to take over the public washroom as their meeting place so that they could engage in their activities without seeking the privacy of the closed toilet cubicles and, by reason of lookouts, without concern for interruption by others not members of their group. Mr. Lofthouse was very frank when he spoke of the privacy he expected as privacy “in the washroom” (not the closed cubicle) and “in the sense of privacy to a family” — the group.³⁵

In 1990, the Supreme Court of Canada categorically rejected this American approach. In *R. v. Duarte*,³⁶ the Supreme Court ruled that the police must obtain a warrant prior to conducting participant monitoring or a consent wiretap (where one of the parties to the conversation, usually a police informant, has consented to the monitoring and recording of the conversation). In 1971, the United States Supreme Court concluded that participant monitoring did not engage the Constitution because the person being recorded assumed a risk that his or her audience would

³⁵ *R. v. Lofthouse*, [1988] O.J. No. 51, 62 C.R. (3rd) 157, at 179-80 (C.A.).

³⁶ [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30; see also discussion in R. Hubbard, “The Internet — Expectations of Privacy in a New Context” (2002) 45 C.L.Q. 170.

disclose the information obtained to law enforcement officials.³⁷ Our court frowned upon this “assumption of risk” approach stating that:

Our perception that we are protected against arbitrary interceptions of private communications ceases to have any real basis once it is accepted that the state is free to record private communications, without constraint, provided only that it has secured the agreement of one of the parties to the communication. Since we can never know if our listener is an informer, and since if he proves to be one, we are to be taken to be tacitly consenting to the risk that the state may be listening to and recording our conversations, we should be prepared to run this risk every time we speak. I conclude that the risk analysis relied on by the Court of Appeal, when taken to its logical conclusion, must destroy all expectation of privacy.³⁸

The Court did not explicitly articulate a new approach to privacy but it is clear that the Court was most concerned with the fact that if the conclusion was reached that there did not exist a reasonable expectation of privacy this would mean that there would be no effective controls over the decision of the police to make permanent recordings of private communications:

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private.³⁹

A few years later the Supreme Court had another opportunity to renounce the “assumption of risk” approach to privacy.⁴⁰ In *Wong*, the Ontario Court of Appeal reached another counter-intuitive conclusion in holding that there did not exist a reasonable expectation of privacy in a hotel room being used for the purposes of illegal gambling. In reversing this holding, the Court provided some indication of the new approach to

³⁷ *White, supra*, note 27.

³⁸ *R. v. Duarte, supra*, note 15, at 47-48.

³⁹ *Id.*, at 44.

⁴⁰ *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36.

be undertaken in assessing the impact of new technology on privacy. The Court stated:

Accordingly, it follows logically from what was held in *R. v. Duarte* that it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.

...unless the question is posed in neutral terms as I have suggested, it follows not only that those who engage in illegal activities in their hotel rooms must bear the risk of warrantless video surveillance, but also that all members of society when renting rooms must be prepared to court the risk that agents of the state may choose, at their sole discretion, to subject them to surreptitious surveillance.⁴¹

Finally, in 1992 the Supreme Court hammered the final nail in the coffin of the “assumption of risk” approach. In *R. v. Wise*,⁴² the Court rejected the conclusion of the United States Supreme Court that employing a tracking device in a vehicle did not intrude upon privacy. Our Court recognized that unlike the audio recording in *Duarte*, and the video recording in *Wong*, the beeper monitor was “unsophisticated” and was merely a “rudimentary extension of physical surveillance”. Nonetheless, the Court concluded that “an individual has a reasonable expectation not only in the communications he makes, but in his movements as well.”⁴³ The Court also noted that “the use of these types of tracking devices on automobiles poses important questions that ultimately have to be resolved by Parliament, and it would, I think, be helpful if this Court could provide some indication of the constitutionality of the use of electronic tracking devices.”⁴⁴

In approaching the elucidation of the privacy right and its impact on law enforcement, the Court in *Wise* was clearly anticipating that its

⁴¹ *Id.*, at 50-51.

⁴² [1992] S.C.J. No. 16, [1992] 1 S.C.R. 527.

⁴³ *Id.*, at 557.

⁴⁴ *Id.*, at 556.

ruling would not be the final word, but rather a catalyst for legislative intervention. The “dialogue” theory of constitutional adjudication animated all of these privacy decisions. The dialogue between the judiciary and Parliament resulted in significant amendments to the *Criminal Code* as Parliament attempted to give expression to the constitutional demands of the Court. The *Borden* case⁴⁵ led to the enactment of the DNA warrant provisions (section 487.05). The *Stillman* case⁴⁶ led to the enactment of body impression warrants (section 487.091). The *Duarte* case⁴⁷ led to the enactment of participant monitoring authorizations (section 184.1). The *Wong* case⁴⁸ led to the enactment of the general warrant which includes authorization for video surveillance (section 487.01), and the *Wise* case⁴⁹ led to the enactment of a tracking device warrant (section 492.1). In the latter example, the tracking warrant can be issued on the basis of “reasonable suspicion” so it can be seen that Parliament listened carefully to the dialogue as it lowered the objective criteria for the issuance of this warrant on the basis that the Court in the *Wise* case held that the expectation of privacy on vehicle movement was reduced (but not entirely absent).

While these previous decisions on section 8 of the Charter effectively fostered dialogue, the *Tessling* decision does not. Not only does the decision lack the catalyst for dialogue, the decision appears to be a departure from the prevailing approach to privacy and it may be a signal for lower courts to exempt other non-intrusive technological investigatory aids.⁵⁰ The prior jurisprudence appeared to zealously guard privacy within a dwelling home and with many rhetorical flourishes the Court sanctified the home as sanctuary:

It is surprising that nearly four hundred years after *Semayne's Case* (1604), 5 Co. Rep. 91, 77 E.R. 194, there should be any debate about the matter. That case firmly enunciated the principle that “a man’s

⁴⁵ *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145.

⁴⁶ [1991] 1 S.C.R. 607.

⁴⁷ *Supra*, note 17.

⁴⁸ *Supra*, note 17.

⁴⁹ *Supra*, note 42.

⁵⁰ For example, in *R. v. Wong*, [2005] B.C.J. No. 204, 2005 BCPC 24, and *R. v. Davis*, [2005] B.C.J. No. 90, 2005 BCPC 11, the courts concluded that the *Tessling* decision cast into doubt the ruling of the Alberta Court of Appeal in *R. v. Lam*, [2003] A.J. No. 811, 178 C.C.C. (3d) 59 that the use of sniffing dogs violated a reasonable expectation of privacy.

home is his castle”, and that even the King himself had no right to invade the sanctity of the home without the authority of a judicially issued warrant. That principle has remained ever since as a bulwark for the protection of the individual against the state. It affords the individual a measure of privacy and tranquillity against the overwhelming power of the state; see also *Entick v. Carrington* (1765), 19 St. Tr. 1029, [95 E.R. 807]. It is a fundamental precept of a free society. The apparent confusion in the courts below is all the more disturbing since in the very statute the police were attempting to enforce, the *Narcotic Control Act* (ss.10 and 12), it is made abundantly clear that a police officer may only enter a dwelling “under authority of a warrant” issued by a justice.⁵¹

...in the *Charter* era, as I will presently seek to demonstrate, the emphasis on privacy in Canada has gained considerable importance...There is no question that the common law has always placed a high value on the security and privacy of the home...Notwithstanding its prior importance, however, the legal status of the privacy of the home was significantly increased with the advent of the *Charter*.⁵²

In *Tessling*, the Court paid lip-service to the sanctity of the home, but ultimately the Court’s analysis focused on “informational privacy” with the location of the intrusion receding into the background. The Court was not concerned by the use of FLIR because the existing crude technology is currently incapable of revealing intimate details of activities within the home. Of course, technology grows quickly by leaps and bounds and the Court recognized that the FLIR technology may improve its capacity to detect movement and details within the home. The Court casually dismissed this concern noting it will cross that bridge when confronted with the modified technology:

If as expected, the capability of FLIR and other technologies will improve the nature and quality of the information hereafter changes, it will be a different case, and the courts will have to deal with its privacy implications at that time in light of the facts as they exist.⁵³

⁵¹ *R. v. Silveira*, [1995] S.C.J. No. 38, 97 C.C.C. (3d) 450, at 463-64.

⁵² *R. v. Feeney*, [1997] S.C.J. No. 49, 115 C.C.C. (3d) 129, at 153.

⁵³ *Supra*, note 23, at 141.

The indifference of the Court is eerily reminiscent of the casual approach of the U.S. Supreme Court to evolving technology. In the *Knotts* case, the U.S. Court was confronted with the assertion that failing to characterize a tracking device as a search would lead to “twenty-four hour surveillance of any citizen of this country...without judicial knowledge or supervision.” The Court’s meek response was that “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”⁵⁴

In my submission there is no place in the world of constitutional adjudication for indifference. A “wait and see” attitude can eviscerate rights which patiently wait for vindication. This casual approach is inconsistent with the Court’s assertion in *Hunter v. Southam* that there must be a mechanism for “preventing unjustified intrusions before they happen, not simply determining, after the fact, whether they ought to have occurred in the first place.”⁵⁵ In addition, there currently exists some evidence to suggest that the FLIR technology may be able to uncover more than simple, ambiguous heat patterns. Presented with a different evidentiary record than in the case at bar, one judge has characterized the nature of the FLIR intrusion as follows:

[a FLIR] can detect human form through an open window when the person is leaning against a curtain, and pressing the curtain between the window screen and his or her body. [A FLIR] can also detect the warmth generated by a person leaning against a relatively thin barrier such as a plywood door.

A FLIR allows the police:

[t]o draw specific inferences about the inside of [a home]. When directed at a home, the infrared device allows the officer to determine which particular rooms a homeowner is heating, and thus using, at night. This information may reflect a homeowner’s financial inability to heat an entire home, the existence and location of energy consuming and heat producing appliances, and possibly even the number of people who may be staying at the residence on a given night. The device discloses information about activities occurring within the confines of a home, and

⁵⁴ *Supra*, note 32, at 1086.

⁵⁵ *Hunter, supra*, note 30, at 160.

which a person is entitled to keep from disclosure absent a warrant.⁵⁶

From the Court's perspective, the nature and scope of FLIR intrusion is so insignificant that it would trivialize the Charter to extend its protection to this investigative technique. As sensible as this logic may appear to be, the Court's perspective flies in the face of an incontrovertible principle established by the Court in its very first case dealing with section 8, *Hunter v. Southam*. In the context of criminal law enforcement, the Court established a principle which governs the entire investigative stage of the criminal process: "The State's interest in detecting and preventing crime begins to prevail over **the individual's interest in being left alone** at the point where credibly-based probability replaces suspicion."⁵⁷ (emphasis added) In other words, imposing constitutional restrictions upon the investigative goals of law enforcement is designed to ensure that residents in a free society will not be monitored and intruded upon unless the state has reasonable and probable grounds to believe that this resident is, has been, or will be involved in criminal activity.

As stated earlier, there is good reason to believe that there has been an ineffective incorporation of constitutional norms within police culture, but it is hard to imagine that there could be problems incorporating a principle as simple and lucid as this *Hunter* principle. Nonetheless, it has to be recognized that our courts have construed the objective criteria of reasonable and probable grounds (the "credibly-based probability") in an open-ended, discretionary fashion, and this lack of certainty may be contributing to the weak incorporation of constitutional norms. For example, the critical determination of "probable cause," as based upon tips received from confidential informants, is now based upon a discretionary, "totality of circumstances" approach.⁵⁸ This totality of circumstances approach was borrowed from a U.S. Supreme Court case which overruled the previous bright-line approach.⁵⁹ In the United States, prior to 1983, an informant's tip had to meet a two-prong test in which there

⁵⁶ *State v. Young*, 867 P.2d 593, 595 (1994).

⁵⁷ *Supra*, note 30, at 167.

⁵⁸ *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140; *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281.

⁵⁹ *Illinois v. Gates*, 103 S.Ct 1983.

had to be sufficient information disclosed by the police with respect to 1) the informant's reliability/veracity and 2) the basis of the informant's information (*i.e.*, the basis by which the informant acquired the information). In moving to the totality of circumstances approach, the Court substituted a common sense approach in which no one factor would be necessary or sufficient. Although common sense should never be abandoned, it is clear that a discretionary standard operates as a much weaker constraint upon the police than does a bright-line standard. The two-prong bright-line standard may have been underinclusive, and may on occasion have prevented a search which would have been reasonable in the circumstances, but it still provides far more guidance to the police than a discretionary standard which can only be assessed *ex post facto*.

While the police are left to struggle with an objective criteria fraught with vagueness,⁶⁰ the *Tessling* decision leaves the impression that the Court has forgotten the other part of the principle — *i.e.*, that the “individual's interest in being left alone” is the rationale for imposing objective criteria for intrusion. The essence of the rights contained in sections 8 and 9 of the Charter is the right to be left alone. Privacy is simply a cultural expression of the need, and the right, to be left alone. Privacy is an abstract concept and to instantiate the content of this abstraction it is necessary to extrapolate from the fundamental political postulate that liberty entails the right to be left alone unless the state has a compelling, overriding interest. As the Court has stated:

This Court has most often characterized the values engaged by privacy in terms of liberty, or the right to be left alone by the state. For example, in *R. v. Dymont*, [1988] 2 S.C.R. 417, at p. 427, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, La Forest J. commented that “privacy is at the heart of liberty in a modern state”. In *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50, 104 C.C.C. (3d) 136, 132 D.L.R. (4th) 31, *per* Cory J., privacy was characterized as including “[t]he right to be free from intrusion or interference”. This interest in being left alone by the state includes the ability to control the dissemination of confidential information.⁶¹

⁶⁰ In *R. v. Landry*, *supra*, note 18, at 180 La Forest J. notes that the expression “reasonable and probable grounds comprises something more than mere surmise, but determining with any useful measure of precision what it means beyond that poses intractable problems both for the police and the courts.”

⁶¹ *R. v. Mills*, [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321, at 365-66.

When the law of search and seizure had as its primary goal the protection of property, it was fairly evident to both police and judges when an intrusion had taken place. When the concrete notion of property was replaced by the abstract notion of privacy, greater indeterminacy was introduced into the assessment of whether a police intrusion constituted a search. The evolution of the right now clearly contemplates the protection of interests which were more intangible and psycho-social in their nature as the clear line demarcating a property invasion has been replaced with a murkier line demarcating a zone of privacy where people can expect to be left alone.

It cannot be gainsaid that FLIR intrusions do not reveal highly-personal and intimate details of domestic life, but the right to be left alone is still violated even when the intrusion does not reveal very much. When the Court characterized the FLIR intrusion as not invading a reasonable expectation of privacy this leads to the reality that there will be no judicial control whatsoever over this practice. Other than obvious budgetary constraints, there would be no constitutional obstacles for the police to engage in “twenty-four hour surveillance of any citizen of this country...without judicial knowledge or supervision.” Perhaps the loss of privacy may be marginal but the right to be left alone is shattered by unregulated police surveillance, whether technological or conventional. An individual’s right to security of the person is enhanced if the individual can retire to his or her home with the knowledge that the police cannot, and will not, randomly target their home for criminal investigation by any means. Living with the knowledge of arbitrary surveillance is incompatible with liberty and security. People may not fear the FLIR technology in particular but many people would object to the unregulated targeting of their dwelling homes for investigative purposes.

In previous cases, the Supreme Court of Canada seemed to recognize that privacy was not just a normative concept but that it should also be viewed as a political concept. Knowing of the impossibility of mapping out a determinate zone of privacy, the Court in earlier cases focused on the political question of when state power can justifiably intrude upon the right to be left alone. In ruling that the warrantless interception of private communications upon consent of one of the parties was unconstitutional, the Court in *Duarte* noted that “if the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude upon pri-

vacy in the furtherance of its goals....”⁶² Similarly, in ruling that warrantless video surveillance was unconstitutional the Court posed the relevant question in a more overtly-political manner:

In the place of the “risk analysis”, *R. v. Duarte* approached the problem of determining whether a person had a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the Charter when effecting the intrusion in question. This involves asking whether the persons whose privacy was intruded upon could legitimately claim that in the circumstances it should not have been open to the agents of the state to act as they did without prior judicial authorization.⁶³

In *Tessling*, the Court focused entirely on the informational privacy issue, and ignored the right to be left alone and the need to curtail random intrusion. The Court took comfort in its earlier decision of *R. v. Plant*⁶⁴ in which it held that there was no reasonable expectation of privacy in hydro records. In 1993 the Court upheld the warrantless seizure of hydro records (once again in search of marijuana grow-ops) on the basis that hydro records do not reveal personal and intimate details of domestic life. Since an individual’s pattern of consumption of electricity was not seen as a private detail, it is not surprising that the Court in *Tessling* would not see the privacy interest in patterns of heat emanation. Superficially, there is a logical connection between the result in *Plant* and the result in *Tessling*, but the Court’s reliance upon *Plant* appears to be disingenuous. There is a critical distinction between seizing records already collected and compiled by the private sector and flying over an individual’s home to conduct a “structure profile.” Clearly, a vital component of the reasoning in *Plant* was the fact that hydro records are collected as part of an ongoing commercial service and the records are readily available to anyone upon asking. The Court stated in *Plant*:

The nature of the relationship between the appellant and the Commission cannot be characterized as a relationship of confidence.

⁶² *Supra*, note 17, at 44.

⁶³ *Supra*, note 15, at 45-46.

⁶⁴ [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281.

The Commission prepared the records as part of an ongoing commercial relationship and there is no evidence that it was contractually bound to keep them confidential... it was clearly the policy of the Calgary Commission to permit police access to the computer data bank, albeit through a computer password. Further, it is generally possible for an individual to inquire with respect to the energy consumption at a particular address, so that this information is subject to inspection by members of the public at large. The accessibility of the information to the public is, in my view, more relevant to the issue than the policy of release developed by the Calgary Commission since the primary concern in this analysis is the expectation of privacy held by the person whose information was released rather than the manner in which the body releasing the information categorized it. Nevertheless, I do not view the relevant relationship in the case at bar as one which is reasonably characterized as confidential.

The place and manner in which the information in the case at bar was retrieved also point toward the conclusion that the appellant held no reasonable expectation of privacy with respect to the computerized electricity records. The police were able to obtain the information online by agreement of the Commission. Accessing the information did not involve intrusion into places ordinarily considered private, as was the case in *Duarte, supra*, and *Wong, supra*. Nor did it involve invasion by state agents in personal computer records confidentially maintained by a private citizen. While the requirement that the police use a password to access the information may suggest some element of privacy in the manner in which the search was conducted, it may equally suggest that the password was merely intended to ensure that on-line information was available only to the police.⁶⁵

It is ironic that in cases dealing with new technology and privacy, the Supreme Court of Canada has gone to great lengths to distance itself from the stingy approach of the American Supreme Court; whereas, on the question of FLIR surveillance our Court has shrugged its shoulders while the United States Supreme Court in 2001 ruled that this type of intrusion was a serious invasion of privacy.⁶⁶ The importance on preventing unregulated intrusions, even marginal ones, into the home was

⁶⁵ *Id.*, at 294-95; see also, L. Austin, "One Step Forward or Two Steps Back? *R. v. Tessling* and the Privacy Consequences for Information Held by Third Parties" (2004) 49 C.L.Q. 22.

⁶⁶ *Kyllo v. U.S.*, 533 U.S. 27 (2001).

not lost on the American court. It noted that “with few exceptions, the question whether a warrantless search of a home is reasonable and hence unconstitutional must be answered no,” and “we have said that the Fourth Amendment draws a firm line at the entrance of the house.” The American court was not moved by the argument that FLIR cannot uncover intimate details of activities within the home because “the fourth amendment protection of the home has never been tied to measurement of the quality or quantity of the information obtained.” As one commentator has noted about the absolutist position of the American courts on protection of the home:

The Court’s message seems clear. There is no informational content limitation on the protection afforded confidentiality in private dwellings. At least in home settings, the nature or amount of confidential information that can be revealed by a technological tool is irrelevant. There is neither a qualitative “intimacy” standard nor a quantitative “substantiality” standard that needs be met. *All* information, *every* fact, *every* detail is critical, intimate and entitled to the privacy protection afforded by the Fourth Amendment.⁶⁷

The message of the American Supreme Court is clear but our Court presents law enforcement officials with an operational dilemma. Police must assess whether any new technology they choose to employ is capable of uncovering intimate details of activities within the home. In my submission, greater respect is shown for the right to be left alone when the judiciary treats the sanctity of the home as inviolate. The right to be left alone when in the home is best secured by rigid adherence to another principle emerging from the *Hunter* case — warrantless searches are presumptively unreasonable. If the Court ruled that FLIR surveillance constituted a search presumptively requiring a warrant this would compel Parliament to evaluate the situation. It could then decide whether to legislatively fashion a specific FLIR warrant, perhaps on a lesser standard of reasonable suspicion, or whether to require the police to obtain a general warrant under section 487.01 of the *Criminal Code* from a provincial court judge upon a standard of reasonable and probable grounds.

By focusing entirely on the less-sacred notion of informational privacy the Supreme Court makes the right to be left alone in the home

⁶⁷ J. Tomkovicz, “Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures” (2002) 72 Miss. L.J. 317, 395.

contingent upon the nature of the activities within the home which can be captured by technological intrusion. In a surprising identity-switch, the Supreme Court succumbed to the allure of the American approach to privacy which has vested enormous discretion in law enforcement officials, and the American Court has championed our Court's due process perspective that the control of police discretion is a necessary component of a fair and just criminal process.

III. MANN AND THE FRISK

Tessling may be a departure from the Court's fairly consistent protection of privacy within the home, but *R. v. Mann*⁶⁸ appears to be consistent with the Court's fairly rigorous protection of invasions of privacy of the person and bodily integrity. Privacy of the person has been strongly protected with virtually automatic exclusion of breath and blood samples unreasonably seized from suspected impaired drivers⁶⁹ and with the exclusion of evidence for violations of bodily integrity when searching incident to arrest.⁷⁰ When the *Mann* decision was released the media reported that the Court had placed further restrictions on police powers⁷¹ and it was reasonable to conclude that this decision was predicated on protecting the physical security of individuals stopped by the police for investigative detention.

Appearances can be deceiving. In actuality, the *Mann* case is about the judicial creation of police powers. The police had a suspicion that Mann was involved in a break and enter. The suspicion was firmly-grounded in the identification evidence provided to the police. The suspect was frisked and then the officer located some marijuana when he searched the suspect's pocket. Traditionally, the police had only two options in approaching a suspect — either arrest the suspect if the suspicion had crystallized into reasonable and probable grounds (and then search incident to arrest), or let the suspect go free and continue the

⁶⁸ [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59.

⁶⁹ See e.g., *R. v. Dymont*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417; *R. v. Dersch*, [1993] S.C.J. No. 116, [1993] 3 S.C.R. 768; *R. v. Pohoretsky*, [1987] S.C.J. No. 26, [1987] 1 S.C.R. 945; *R. v. Colarusso*, [1994] S.C.J. No. 2, [1994] 1 S.C.R. 20.

⁷⁰ *R. v. Greffe*, [1990] S.C.J. No. 32, [1990] 1 S.C.R. 755; *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679.

⁷¹ Graeme Smith, "Top Court Limits Frisking Rights of Police" *The Globe and Mail* (24 July 2004) A7.

investigation without the suspect being detained. The traditional position was clearly outlined by Martin J.A.:

Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies to police officers as to anyone else. Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless, of course, the officer arrests him....⁷²

Based upon the developing jurisprudence in the appellate courts, the Supreme Court ruled that a power of investigative detention exists when there are “reasonable grounds to detain” and upon this detention there exists a power of protective search. The protective search only extends to searching (by frisking) for weapons and does not include searching for evidence. Accordingly, the officer in *Mann* exceeded the scope of search incident to detention by searching the accused’s pocket after the frisk revealed a “soft” object in the pocket. The soft object could not conceivably be a weapon thus the officer has no authority to search the pocket. The Court excluded the evidence on the basis that good faith could not be satisfied by an officer’s unreasonable error about the scope of his or her authority.

A great deal has been written about investigative detention and this case⁷³ so the following analysis will be relatively brief. Although the power to search incident to detention was restricted to a protective pat-down or frisk, *Mann* effectively expanded police powers in a manner not conducive to fostering dialogue with Parliament. The traditional

⁷² *R. v. Dedman* (1984), 59 C.C.C. (2d) 97, 108-109 (Ont. C.A.).

⁷³ A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991) 29 Osgoode Hall L.J. 329; A. Patel, “Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police Judgment” (2001) 45 C.L.Q. 198; L. McCoy, “Liberty’s Last Stand? Tracing the Limits of Investigative Detention” (2002) 46 C.L.Q. 319; J. Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 Alta. L.R. 335; L. McCoy, “Some Answers from the Supreme Court on Investigative Detention” (2004) 49 C.L.Q. 268; T. Quigley, “*Mann*, It’s a Disappointing Decision” (2004) 21 C.R. (4th) 41; D. Tanovich, “The Colourless World of *Mann*” (2004) 21 C.R. (4th) 47.

approach to police powers was one of “strict authorization”⁷⁴ in which the police could only exercise a power specifically granted to them by statute or common law. In the past few decades, the Court has relied upon the “ancillary powers” doctrine to police powers in which the police possess whatever power is reasonably necessary to effect their duties. Instead of searching for an explicit grant of power, under this doctrine a court will give *ex post facto* approval to the exercise of a police power if the police conduct was within the “general scope of any legal duty” and if the conduct was not an “unjustifiable use of power associated with the duty.”⁷⁵

With respect to a power of investigative detention, in 1993, the Ontario Court of Appeal in *R. v. Simpson* applied the ancillary powers doctrine to give birth to a power of investigative detention upon articulable cause or reasonable suspicion. The Court noted:

Especially in light of the definition of “detention” adopted in *R. v. Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481, [45 C.R. (3d) 97] and *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, [63 C.R. (3d) 1], I have no doubt that the police detain individuals for investigative purposes when they have no basis to arrest them. In some situations the police would be regarded as derelict in their duties if they did not do so. I agree with Professor Young, “All Along the Watch Tower,” *supra*, at p.367 when he asserts:

The courts must recognize the reality of investigatory detention and begin the process of regulating the practice so that street detentions do not end up being non-stationhouse incommunicado arrests.

Unless and until Parliament or the Legislature acts, the common law and specifically the criteria formulated in *Waterfield*, *supra*, must provide the means whereby the courts regulate the police power to detain for investigatory purposes.⁷⁶

In an earlier article of mine, *All Along the Watchtower: Arbitrary Detention and the Police Function*,⁷⁷ I had asserted that unauthorized

⁷⁴ R. Way, “The Law of Police Authority: The McDonald Commission and the McLeod Report” (1985) Dal. L.J. 683.

⁷⁵ *R. v. Waterfield*, [1964] 1 Q.B. 164.

⁷⁶ *R. v. Simpson*, [1993] O.J. No. 308, 20 C.R. (4th) 1, at 19 (C.A.).

⁷⁷ Young, *supra*, note 78.

investigative detention is a daily routine in Canadian policing and the traditional common law position simply ignored this reality. Many other jurisdictions have authorized brief investigative detentions⁷⁸ and I had argued that the time had come to recognize that this investigative practice was a practical necessity which would be employed regardless of whether it was lawfully authorized. Ironically, the passage quoted from my article suggests that I was asserting that it was within the judicial function to create a new power of investigative detention, whereas upon further reading it was clear that the article was calling for a legislative response:

By providing explicit authorization for the practice of investigatory detention, the legislatures are able to construct safeguards which may include the keeping of detailed registers, the provision of medical examinations, the notification of counsel, family, or friends, and various official warnings to inform the suspect of the reason for the detention, and the right to remain silent. The potential for abuse is not eliminated yet it is no small achievement for law enforcement officials to be compelled to transform a low-visibility practice into one of official regulation with stated limitations.⁷⁹

There are a number of reasons why a power of investigative detention should be crafted by the legislature and not the judiciary.⁸⁰ First, the ancillary powers doctrine should not be employed on a routine basis and should be restricted to situations of an emergency nature. An expediency test consisting of what is “reasonably necessary” in the circumstances provides little guidance to the police and vests far too much discretion in the officer. A police power should be easily ascertainable before the fact and not created after the fact to suit the facts of a particular case. The common law is an ill-suited vehicle for the creation of police powers because of the piecemeal nature of adjudication. The evolutionary common law process will rarely yield resolute and clear guidance for the police. Even though the Ontario Court of Appeal gave its seal of approval to the power of investigative detention in 1993, it took a further 12 years before the issue was finally resolved by the Supreme Court

⁷⁸ *Id.*, at 367-73.

⁷⁹ *Id.*, at 368.

⁸⁰ See, A. Young, “The Charter, the Supreme Court of Canada and the Constitutionalization of the Investigative Process”, in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Thompson Canada: Toronto, 1996); L. McCoy (2004), *supra*, note 78.

of Canada. Surprisingly, the Court denied leave to appeal in *R. v. Ferris*⁸¹ on December 18, 1998 even though this case starkly raised the issue of search incident to investigative detention. For whatever reason, it took the Court over 10 years to resolve an issue of practical and daily significance for policing.

In the 12 years it took for the Court to respond to this issue, the police were confronted with a series of legal questions with nowhere to turn for answers. Leslie McCoy summarized the unresolved questions arising from the judicial creation of a power of investigative detention:

- Should there be a general power to detain for investigative purposes?
- Is “articulable cause” an appropriate term to use to refer to the grounds necessary to base an investigative detention, or are the terms “reasonable grounds to detain” or “reasonable grounds to suspect” more appropriate?
- What is meant by a “brief” detention?
- Can a suspect be removed to a secondary location in the course of a valid investigative detention?
- Is it ever permissible for the police to go beyond a mere pat-down search during an investigative detention?
- What does it mean for the police to advise a detainee “in clear and simple language” of the reasons for his or her investigative detention?
- Do s. 10(b) Charter rights apply upon investigative detention?⁸²

Most unfortunately, the Court’s decision in *Mann* does not address any of these issues with any degree of clarity. If anything the Court muddled the waters by transforming the requisite grounds for detention from the recognized standard of “reasonable suspicion” or “articulable cause” to the unknown and uncertain standard of “reasonable grounds to detain.”

Undoubtedly, it is reasonable to create a half-way house between arrest and liberty, as in many circumstances it would constitute a dereliction of duty for the police to walk away from a suspect simply because a reasonable suspicion has not yet reached the level of reasonable and probable grounds for an arrest. The ancillary powers doctrine has had vibrant

⁸¹ [1998] B.C.J. No. 1415, 126 C.C.C. (3d) 298 (C.A.). When the Court denied leave to appeal there were four other appellate court decisions creating a power to search incident to detention and this added to the need for the Court to finally resolve the issue.

⁸² McCoy (2004), *supra*, note 78, at 285.

application with respect to the exercise of powers of detention to deal with altercations and rapidly-developing problems in public forums. Without this doctrine the police would be handicapped in dealing with issues of crowd control⁸³ and emergency calls for help.⁸⁴ Ancillary powers complement the need for the police to respond quickly to unforeseen developments, but until the *Mann* case it had not been used to create new search powers. A search is not designed to defuse an emergency — it is usually a carefully considered response to an ongoing investigative need. Without the element of immediacy being present there has been little need to employ ancillary powers to expand search powers.

Historically, the courts have consistently applied the doctrine of “strict construction” to search powers.⁸⁵ In the Supreme Court’s very first pronouncement on section 8 of the Charter, the Court went to great lengths to emphasize that the Charter “is not in itself an authorization for governmental action” and that “it does not confer any powers, even of ‘reasonable’ search and seizure, on these governments.”⁸⁶ Upon declaring warrantless video surveillance to be unconstitutional, the Court in *Wong* was asked to create a new search warrant for video recordings. The Court categorically rejected this request to design new search powers:

...the courts would be forgetting their role as guardians of our fundamental liberties if they were to usurp the role of Parliament and purport to give their sanction to video surveillance by adapting to that purpose a code of procedure dealing with an altogether different surveillance technology. It is for Parliament, and Parliament alone, to set out the conditions under which law enforcement agencies may employ video surveillance technology in their fight against crime. Moreover, the same hold true for any other technology which the progress of science places at the disposal of the state in the years to come. Until such time as Parliament, in its wisdom, specifically provides for a code of conduct for a particular invasive technology, the courts should forbear from crafting procedures authorizing the deployment of the technology in question. The role of the courts

⁸³ *R. v. Knowlton*, [1974] S.C.R. 443.

⁸⁴ *R. v. Godoy*, [1998] S.C.J. No. 85, [1999] 1 S.C.R. 311.

⁸⁵ *R. v. Colet*, [1981] 1 S.C.R. 2.

⁸⁶ *Hunter*, *supra*, note 30.

should be limited to assessing the constitutionality of any legislation passed by Parliament which bears on the matter.⁸⁷

In *Mann* the Court did not take its own sage advice to “forbear from crafting” search powers. In fact, the Court seemed to disregard the evidence suggesting that the American approach to investigative detention (“stop and frisk”)⁸⁸ has turned out to be unwieldy and poorly-regulated. Prior to the decision in *Mann*, one commentator implored the Court not to follow the American approach in having the judiciary craft the contours of the powers to detain and search suspects:

The Supreme Court of Canada should think carefully before deciding to endorse a judicially-created investigative detention power. If the American experience can teach us anything, it is that a case-by-case approach to the explication of police powers associated with investigative detention can be dangerous. It invariably takes place while a guilty person is before the court, evoking a strong desire to affirm the conduct of the police and ensure that wrongdoing is punished. This leads to an almost inevitable expansion of police authority. As one American commentator recently observed:

Terry has not succeeded... the nature of judicial review contemplated — deferential review of discretionary, low profile, street level decisions according to a malleable balancing standard — was poorly suited to achieve the desired result of creating clear guidelines for the use of stop and frisk... It offered little guidance about what sorts of police conduct would be permissible... It should come as no surprise that ... movement by the lower courts, prosecutors, police, and even the Supreme Court itself has been inexorably away from *Terry*’s narrow holding and toward increased police discretion... Judicial review has not succeeded in controlling the widespread abuse of stop and frisk, the vast brunt of which falls, as it did in 1968, on minority suspects.⁸⁹

It would have been more prudent for the Court to recognize the daily reality of investigative detention but decline to give its judicial stamp of approval to the practice. Only by leaving this gaping hole in daily

⁸⁷ *Wong, supra*, note 15, at 57.

⁸⁸ *Terry v. Ohio*, 392 U.S. 1.

⁸⁹ Stribopoulos, *supra*, note 78, at 379; quoting S. Bandes, “*Terry vs. Ohio* In Hindsight” (1999) 16 Const. Commentary 491, at 493-94.

investigative work would Parliament be galvanized into action to remedy the shortcoming. As La Forest J. had stated in the context of police powers: “the duty of courts has always been to act as a brake...courts undoubtedly have a creative role in developing the law, but they must be extremely wary of widening the possibility of encroaching on our personal liberties.”⁹⁰ If the Court believed it had the authority and confidence to create these new powers, it was then incumbent on the Court to provide specific guidance on many of the unanswered questions relating to length of detention, right of counsel, movement of suspect to another location and the need to compile formal records or incident reports relating to the detention.

It might be considered highly unorthodox for a Court to construct a code of police practice as this appears to stray too close to the legislative function. Police powers have always been viewed as a public policy issue requiring legislative intervention.⁹¹ However, the Court has taken on the role of mini-legislature in other criminal justice contexts. The courts have had the primary responsibility to fashion the principles relating to liability, fault and defences, and courts have felt a greater degree of comfort in setting out a mini-code to address issues which have been characteristically delegated by the legislature to the judiciary. For example, the defence of entrapment received the judicial stamp of approval in 1988.⁹² In providing the juridical foundation for this defence the Court established a general test and a specific list of factors to take into account in applying the test. The test for entrapment was framed as follows:

there is entrapment when:

- (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;

⁹⁰ *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 187.

⁹¹ However, in *Golden*, *supra*, note 13, the Court did set out a list of factors or mini-code of conduct to govern strip searches.

⁹² *R. v. Mack*, [1988] S.C.J. No. 91, [1988] 2 S.C.R. 903.

(b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.⁹³

The Court then stipulated that the following factors should be assessed in determining if the test for entrapment has been satisfied:

To determine whether the police have employed means which go further than providing an opportunity, it is useful to consider any or all of the following factors:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- the persistence and number of attempts made by the police before the accused agreed to committing the offence;
- the type of inducement used by the police, including: deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
- the existence of any threats, implied or express, made to the accused by the police or their agents;
- whether the police conduct is directed at undermining other constitutional values.⁹⁴

⁹³ *Id.*, at 964.

⁹⁴ *Id.*, at 966.

The Court's quasi-legislative approach in the *Mack* case is the only responsible approach to be taken when the Court decides to exercise its creative, rather than interpretive, powers. By simply acknowledging the existence of the power of investigative detention and search, without providing concrete guidance on numerous operational issues, the Court in *Mann* has left the police in the worst of all possible worlds. The police cannot guide themselves by the general terms of the *Mann* case, and there would be little hope that Parliament would step in to resolve the outstanding questions. From the Parliamentary perspective the Supreme Court has done the job for the Parliamentarians and the legislative branch of government will sit back and leave the details to be worked by the evolution of the common law. *Mann* is a dead-end decision and while judges and police officers struggle to emerge from the cul-de-sac there will remain a great deal of uncertainty about the rights of individuals and the powers of police whenever an investigative detention is undertaken.

IV. CONCLUSION

On January 8, 2005 the front-page of the *Globe and Mail* newspaper reported that "a long rancorous debate over judicial activism has waned thanks to a growing, understanding that judges sometimes have no choice but to strike down laws, Chief Justice Beverley McLachlin says". No doubt Canadians have grown accustomed to judges wielding political power through constitutional decisionmaking, and many of the standard political objections to non-elected officials exercising political power have grown tiresome and irrelevant. However, the way in which the *Tessling* and *Mann* cases chill further dialogue between court and legislature may give rise to a new debate about judicial inactivity rather than judicial activism. A proper understanding of activism would dictate that the Supreme Court of Canada should seize the available opportunities to clarify the boundaries of police power and not issue narrow rulings under the guise of allowing the power to evolve incrementally under the common law.

It is not surprising that there has been poor incorporation of constitutional norms within police culture when the Supreme Court issues decisions which raise more questions than they answer. When it comes to novel technology and the home, it is unfair to require an officer to make the determination of whether to obtain a warrant on the basis of

whether this technology can capture intimate details. As in 1993, it is best to leave the question of police empowerment through new technology for Parliament and if, and when, Parliament determines that it wants to add a particular, invasive technology to the police arsenal, the Court can review the power to determine if it comports with the Constitution.

When it comes to street detentions, it is unfair to require the police to decipher the relationship between reasonable grounds to detain, reasonable grounds to suspect and reasonable and probable grounds. If the Court cannot provide sufficient guidance in creating new powers for state officials, it should decline to do so and in taking no action it can compel Parliament to address the issue in a comprehensive manner. Creating new police powers without attempting to address the issue in a comprehensive manner is judicial activism gone awry.

Tessling and *Mills* both vest enormous discretion in the police. Discretion may be indispensable for the proper administration of criminal justice but unconstrained discretion can subvert the very foundation of justice. The Supreme Court has made a mistake in allowing the police to randomly target a home for infra-red imaging. The Supreme Court also made a mistake in approving of the powers of investigative detention and search incident to this detention without providing clear guidance as to the parameters of this “brief” intrusion. There is something about these two cases which lends itself to making mistakes. Lost in the midst of the legal debate, it is easy to forget that the police made mistakes in both cases. Mann was not the suspected burglar and *Tessling* was not the suspected marijuana grower.⁹⁵

⁹⁵ In *Tessling* the courts talk about the seizure of a large quantity of marijuana but never speak of a grow room with plants and halide lights which could account for the FLIR imaging.